No. 17-1594

IN THE

Supreme Court of the United States

RETURN MAIL, INC.,

Petitioner,

v.

UNITED STATES POSTAL SERVICE, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* ELECTRONIC FRONTIER FOUNDATION AND BRIEF OF *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* ELECTRONIC FRONTIER FOUNDATION

The Court's resolution of this case will have powerful practical and precedential consequences. *Amicus curiae* Electronic Frontier Foundation ("EFF") is a public interest organization that has worked for 25 years to protect consumer interests, innovation, and free expression in the digital world, and therefore can provide unique insight into the broad implications this Court's decision has for individual consumers, innovators, and small businesses across the country. EFF has previously served as an *amicus* in patent cases before this Court, including *HP Inc., v. Steven E. Berkheimer*, No. 17-1437 (2018); *Ariosa Diagnostics, Inc., v. Illumina, Inc.*, No. 18-209 (2018); *Alice Corp. Pty. Ltd. v. CLS Bank International*, 134 S. Ct. 2347 (2014); and *Bilski v. Kappos*, 561 U.S. 593 (2010).

EFF notified counsel of record for both parties that it intended to submit the attached brief in support of Respondent. Petitioner's counsel provided consent. EFF did not receive a response from Respondent's counsel before the filing deadline. Therefore, pursuant to Supreme Court Rule 37.2(b), EFF respectfully moves this Court for leave to file the accompanying brief of *amicus curiae* in support of Respondent.

"[T]he classic role of [an] *amicus curiae*" is to "assist[] in a case of general public interest, supplement[] the efforts of counsel, and draw[] the court's attention to law that escaped consideration." *Miller-Wohl Co. v. Comm'r of Labor & Indus.*, 694 F.2d 203, 204 (9th Cir. 1982). "Even when a party is very well represented, an amicus may

provide important assistance to the court." *Neonatology Assocs., P.A. v. C.I.R.*, 293 F.3d 128, 132 (3d Cir. 2002) (Alito, J.). Courts routinely permit *amicus* briefs to provide such assistance. *See id.* at 303 ("[I]f a good brief is rejected, the merits panel will be deprived of a resource that might have been of assistance."); *Mass. Food Ass'n v. Mass. Alcoholic Beverages Control Comm'n*, 197 F.3d 560, 567 (1st Cir. 1999) ("[A] a court is usually delighted to hear additional arguments from able amici that will help the court toward right answers . . . ."). Given the insularity of patent litigation, the need for such assistance in patent cases is especially great. *See* The Honorable Timothy B. Dyk, *Ten Prescriptions for Patent Law*, 17 Stanford Tech. L. Rev. 345, 353 (Winter 2014) ("As a general matter, the only interests represented are those of the patent holder and its competitors or potential licensees . . . There is a need for more Brandeis briefs to educate the courts as to the larger issues involved, and how those issues impact constituencies not before the court as parties.").

EFF will discuss the effect this Court's decision will have on the patent system's ability to promote innovation and the dissemination of knowledge to the public. In support of Respondent's position, EFF will discuss cases, not cited by the parties, establishing the government's right to challenge granted patents as well as the public's interest in having the government do so; the public's concerns about invalid business method patents that led Congress to enact the provisions of the America Invents Act ("AIA") at issue here; and the consequences a reversal would have on public resources and incentives for innovation.

EFF and its community know firsthand how powerfully developments in patent law can affect incentives and opportunities for innovation in this country. The public benefits from successful challenges to invalid patents, regardless of whether the challenger is a public or private entity. A reversal will deprive the public of these benefits and impose unnecessary costs that taxpayers ultimately have to bear. EFF respectfully requests leave to file the accompanying *amicus* brief to assist the Court in understanding the potential impact of this case on the public and patent system as a whole.

Dated: January 16, 2019

Respectfully submitted,

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF CITED AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 1

ARGUMENT 4

I. The Government's History of Initiating Patent Challenges and the AIA's Goal of Improving Patent Quality Confirm that the Government Qualifies as a "Person" in this Context 4

A. Treating the Government as a "Person" Is Consistent with More than a Century of Precedent Recognizing its Right to Challenge Invalid Patents 5

B. Defining "Person" to Include the Government Reflects Established Patent Office Procedure and Practice 6

C. An Inclusive Definition of "Person" Aligns with the AIA's Goal of Improving Patent Quality by Enhancing Third Party Participation in Post-Grant Review 7

Cited Authorities

Page

II. Excluding the Government from Post-Grant Review Will Increase Litigation Costs, Diminish Patent Quality, and Impede Innovation 9

III. Congress's Decision to Limit the AIA's Expansive Estoppel Bar to District Court and ITC Actions Is Eminently Reasonable; It Is also Irrelevant.....11

A. Principles of *Res Judicata* Apply in the Court of Federal Claims 11

B. Congress Had Compelling Reasons to Apply an Expansive Estoppel Bar Only to Subsequent District Court and ITC Actions.....12

CONCLUSION 14

TABLE OF CITED AUTHORITIES

Page

Cases

Alice Corp. Pty. v. CLS Bank Int'l,
573 U.S. 208 (2014) 1, 8

Bilski v. Kappos,
561 U.S. 593 (2010) 1, 8

Coakwell v. United States,
292 F.2d 918 (Ct. Cl. 1961) 12

Mayo Collaborative Servs. v. Prometheus Labs., Inc.,
566 U.S. 66 (2012) 8

Morse Arms Mfg. Co. v. United States,
16 Ct. Cl. 296 (1880) 5, 6

Reoforce, Inc. v. United States,
119 Fed. Cl. 1 (2013) 11

United States v. Am. Bell Tel. Co.,
128 U.S. 315 (1888) 5

Statutes

28 U.S.C. § 1498 3

35 U.S.C. § 101 9

35 U.S.C. § 282 9

Cited Authorities

Page

35 U.S.C. § 315 3

35 U.S.C. § 325 3

Legislative Materials

157 Cong. Rec. H4497 (daily ed. June 23, 2011) 8

157 Cong. Rec. S131 (daily ed. Jan. 25, 2011) 7

157 Cong. Rec. S5319 (daily ed. Sept. 6, 2011) 7

157 Cong. Rec. S1365 (daily ed. Mar. 8, 2011) 8

157 Cong. Rec. S7413-02 (daily ed. Nov. 14, 2011) 8

Other Authorities

John R. Allison & Mark A. Lemley, *Empirical Evidence on the Validity of Litigated Patents*, 26 AIPLA Q.J.185 (1998) 10

John R. Allison, Mark A. Lemley & David L. Schwartz, *Understanding the Realities of Modern Patent Litigation*, 92 Tex. L. Rev. 1769 (2014) 9-10

Stephen Yelderman, *Do Patent Challenges Increase Competition?*, 83 U. Chi. L. Rev. 1943 (2016) 10

Stephen Yelderman, *The Value of Accuracy in the Patent System*, 84 U. Chi. L. Rev. 1217 (2017) 10

INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae the Electronic Frontier Foundation ("EFF") is a nonprofit civil liberties organization that has worked for more than 25 years to protect innovation, free expression, and civil liberties in the digital world. EFF and its more than 37,000 dues-paying members care deeply about ensuring that intellectual property law in this country serves the goal set forth in the Constitution: promoting the progress of science and technological innovation. As part of its mission, EFF has often served as an *amicus* in patent cases before this Court, including *HP Inc., v. Steven E. Berkheimer*, No. 17-1437 (2018); *Ariosa Diagnostics, Inc., v. Illumina, Inc.*, No. 18-209 (2018); *Alice Corp. Pty. Ltd. v. CLS Bank International*, 134 S. Ct. 2347 (2014); and *Bilski v. Kappos*, 561 U.S. 593 (2010).

INTRODUCTION AND SUMMARY OF ARGUMENT

The America Invents Act ("AIA") created new post-grant proceedings designed to enhance the ability of third parties to challenge granted patents in front of the Patent Trial and Appeal Board ("PTAB") instead of in federal court. Those post-grant review proceedings are central to

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1. Pursuant to Rule Supreme Court Rule 37.3(a), EFF requested consent to file this brief from both parties. At the time of filing, Petitioner had provided consent, but EFF has yet to receive a response from Respondent. Pursuant to Rule 37.6, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity, other than amicus, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

achieving the goals Congress intended the AIA to achieve: improving the quality of issued patents, reducing the cost of patent litigation, and restoring the public's confidence in the U.S. patent system.

Underlying these goals is a principle that should be uncontroversial: third parties should be able to challenge granted patents that are invalid efficiently and effectively to ensure the patent system promotes more innovation than it impedes.

In recognition of that principle, courts and the Patent Office have consistently authorized government entities to initiate patent challenges using the same statutory provisions available to private citizens. Accordingly, before the AIA's enactment, the Patent Office defined the word "person" to include government entities for the specific purpose of initiating post-grant reexamination proceedings. Given Congress's intent that the AIA *broaden* third party participation, the word "person" should carry at least as broad a meaning in the AIA as it did before.

Narrowing the definition of "person" to exclude the government would not only depart from these longstanding precedents and practices, but do so at the public's expense. Reversing the judgment of the Federal Circuit and Patent Office will revive an invalid patent so that it can be asserted against the government as well as others. That will drive up litigation costs for the government and deprive the general public of knowledge that should be available to all. These harms will affect the public no less because the Postal Service is a government entity instead of a private corporation. If anything, the public

nature of these harms will be that much greater because taxpayers will bear the additional costs of litigating or licensing Petitioner's invalid patent.

Recognizing that the AIA provides no support for the narrow reading it proposes, Petitioner attempts to graft the limitations of the AIA's estoppel provision onto to the broad phrase at issue here: "[a]ny person other than the patent owner." That argument has no merit. Regardless of the AIA, principles of *res judicata* apply with full force in suits filed pursuant to 28 U.S.C. § 1498 against the government in the Court of Federal Claims. Under that court's precedent, these principles even bar litigation when the government is heavily involved in, but not technically a party to, a prior Patent Office proceeding.

Given that *res judicata* independently bars re-litigation against the government in the Federal Court of Claims, Congress had good reason not to extend the AIA's expansive estoppel provisions there too. The AIA goes beyond the common law in barring re-litigation of any issue a petitioner "reasonably could have raised" in subsequent actions between private litigants. *See* 35 U.S.C. § 315(e) (inter partes review) & § 325(e) (post-grant review). Preventing the government from raising even *new* validity issues in subsequent litigation will only ensure that invalid patents drain resources from public coffers. Congress avoided that result by limiting the AIA's estoppel bar to disputes between private parties, where the public would also benefit from additional deterrence against vexatious patent litigation.

Whatever Congress's reasoning, its decision to limit the AIA's estoppel bar explicitly does not suggest those

same limitations should be read into the broad permission Congress gave for "[a]ny person other than the patent owner" to initiate review.

While Petitioner's desire to shield its invalid patent from such review is understandable, no authority or practice in the history of patent law supports, let alone requires, immunity from government-initiated validity proceedings. We respectfully urge the Court not to set such a precedent now.

ARGUMENT

I. The Government's History of Initiating Patent Challenges and the AIA's Goal of Improving Patent Quality Confirm that the Government Qualifies as a "Person" in this Context.

The government's right to initiate patent cancellation proceedings is well-established. This Court, the Court of Claims, and the Patent Office have all recognized the government's right to challenge granted patents. Before the AIA's enactment, the Patent Office had defined the word "person" to include government entities. Given the AIA's goal—improving patent quality by broadening third party participation in post-grant proceedings—Congress's decision to use the same word without further limitation confirms the Patent Office's broad interpretation should stand.

A. Treating the Government as a "Person" Is Consistent with More than a Century of Precedent Recognizing its Right to Challenge Invalid Patents.

More than a century ago, this Court upheld the government's right to initiate patent cancellation proceedings in federal court, and recognized the public's interest in having it do so. *See United States v. Am. Bell Tel. Co.*, 128 U.S. 315, 370 (1888) ("That the government, authorized both by the Constitution and the statutes to bring suits at law and in equity, should find it to be its duty to correct this evil, to recall these patents, to get a remedy for this fraud, is so clear that it needs no argument.").

No case Petitioner cites suggests the government is *limited* to cancellation proceedings in federal court. To the extent it relies on the word "person" for such limitations, the Federal Circuit's predecessor court, the Court of Claims, long ago rejected a similar attempt to exclude the government from statutory provisions available to individuals seeking to challenge granted patents. *See Morse Arms Mfg. Co. v. United States*, 16 Ct. Cl. 296, 303 (1880).

In *Morse*, a patent assignee sued for compensation from the government for the Secretary of War's alleged use of his invention. Among other defenses, the government challenged the patent's validity. Much like the Petitioner here, the assignee objected, arguing that "the United States being the grantors of the patent it is not open to officers of the government to question its effect to the extent of the grant." *Id.* at 302. The court rejected that argument, holding that "statutes which allow individuals

to question the validity of a patent do not shut out the government from the same right" because, in this context, "the government's rights are certainly as broad as those of the citizen." *Id.*

Morse has gone unchallenged for more than a century for good reason: allowing government entities to challenge invalid patents under statutory provisions available to ordinary citizens serves the public and the patent system by helping stem the tide of invalid patents that should not have issued.

B. Defining "Person" to Include the Government Reflects Established Patent Office Procedure and Practice.

Adopting Petitioner's narrow definition would depart from these century-old principles as well as established Patent Office practice. As other *amici* explain, "the practice of the PTO at the time of enactment of the AIA recognized that governmental entities were included in the 'any person' that could bring an *ex parte* or *inter partes* reexamination." New York Intellectual Property Law Ass'n Br. ("NYIPLA Br.") at 8-9. Indeed, the Patent Office's Manual of Patent Examination Procedure defines "person" to include government entities. *See* MPEP §§ 2203 (inter partes reexamination) & 2212 (ex parte reexamination); *see also* Resp't Br. at 28 and NYIPLA Br. at 9 (citing *id.*). The fact that the Patent Office defined "person" to include government entities before and after the enactment of the AIA without any intervention from Congress confirms that the Patent Office's definition should remain in effect.

C. An Inclusive Definition of "Person" Aligns with the AIA's Goal of Improving Patent Quality by Enhancing Third Party Participation in Post-Grant Review.

The Patent Office's inclusive definition of "person" receives further support from the background and objectives of the statute in which it appears. The AIA was a response to "concerns heard in Congress that questionable patents are too easily obtained and too difficult to challenge." 157 Cong. Rec. S131 (daily ed. Jan. 25, 2011) (statement of Sen. Leahy). To address these concerns, Congress aimed to "both speed the application process and, at the same time, improve patent quality," specifically, by "providing for greater input from third parties to improve the quality of patents issued and that remain in effect." *Id.*

Greater third-party participation is the AIA's primary mechanism for improving the quality of issued patents and reducing the costs of litigating them. *See* 157 Cong. Rec. S5319 (daily ed. Sept. 6, 2011) ("The overarching purpose and effect of the present bill is to create a patent system that is clearer, fairer, more transparent, and more objective. It is a system that will ultimately reduce litigation costs and reduce the need to hire patent lawyers.") (statement of Sen. Kyl).

Public concerns about the costs of business method patents such as Petitioner's were especially great. *See id.* ("By allowing post-grant review of patents, *especially low quality, business method patents*, the bill creates an inexpensive substitute for district court litigation and allows key issues to be addressed by experts in the field.")

(emphasis added). That is partly because the Patent Office examined and granted many business method patents before this Court's decisions in *Bilski v. Kappos*, 561 U.S. 593 (2010), *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 566 U.S. 66 (2012), and *Alice Corp. Pty. v. CLS Bank Int'l*, 573 U.S. 208 (2014).

Many of those patents (including this one) claim computer-implemented methods that are not eligible for patent protection under this Court's intervening patent-eligibility precedents. Congress specifically created covered business method review ("CBMR"), the only form of post-grant review allowing patent-eligibility challenges, to ensure meaningful scrutiny of these patents. *See* 157 Cong. Rec. H4497 (daily ed. June 23, 2011) (statement of Rep. Smith) ("Section 18 [establishing CBMR] is designed to address the problem of low-quality business method patents."); *see also* 157 Cong. Rec. S1365 (daily ed. Mar. 8, 2011) (statement of Sen. Schumer) (CBMR "will go a long way towards addressing the havoc that frivolous business method patent litigation has wreaked upon the courts and the economy."). As one of the bill's sponsors emphasized: "This program was designed to be construed as broadly as possible and as USPTO develops regulations to administer the program that must remain the goal." 157 Cong. Rec. S7413-02 at 7413-14 (daily ed. Nov. 14, 2011) (letter of Rep. Smith).

Congress's vocal support for a broad construction of the CBMR provision reflects its overriding intent that the AIA facilitate the cancellation of invalid patents. This case is just one example of how the Patent Office's definition of "person" achieves that goal.

II. Excluding the Government from Post-Grant Review Will Increase Litigation Costs, Diminish Patent Quality, and Impede Innovation.

Limiting the government to patent challenges in the Court of Federal Claims will necessitate more litigation over invalid patents and impose additional costs on the public. In post-grant proceedings, the PTAB necessarily decides questions of patent validity (on a narrow subset of grounds), not infringement, enforceability, or other legal issues that federal courts decide. These proceedings also provide far less opportunity and time for discovery, further reducing the time and cost of adjudicating patent validity. Thus, AIA proceedings before the PTAB are far more efficient means of challenging invalid patents, and those efficiencies are the same for private and public entities.

This case demonstrates the harm that will result from eliminating this efficient path. A patent that the Federal Circuit and PTAB agree is invalid under 35 U.S.C. § 101 will be back in effect, allowing its owner to sue or threaten to sue others, including the Postal Service. If the parties litigate validity and infringement in the Court of Federal Claims, a final decision, which might take years of further litigation, would return to the Federal Circuit on appeal.

Still, there is no guarantee that a future challenge will invalidate this patent. The PTAB does not give unexpired patents a presumption of validity or require clear and convincing evidence from patent challengers. A court, however, must, *see* 35 U.S.C. § 282, forcing the government to overcome a heavy burden that in many cases should not exist. *See* John R. Allison, Mark A. Lemley & David L.

Schwartz, *Understanding the Realities of Modern Patent Litigation*, 92 Tex. L. Rev. 1769, 1801 (2014) ("Forty-six percent of patents whose validity was decided in the 1990s were held invalid; today the invalidation rate is 43%.") (citing John R. Allison & Mark A. Lemley, *Empirical Evidence on the Validity of Litigated Patents*, 26 AIPLA Q.J.185, 205 (1998)).

The AIA's procedures are uniquely designed to maximize the public benefits that come from adjudicating validity issues. Because AIA proceedings "can be used to challenge only a patent's validity, they focus litigation resources on the issues that are most likely to confer a public benefit for competition." Stephen Yelderman, *Do Patent Challenges Increase Competition?*, 83 U. Chi. L. Rev. 1943, 2004 (2016). Over time, the expectation of post-grant review can encourage improvements in the quality and clarity of patent applications. Because "revoking an undeserved patent through a postgrant process can reduce future prospective inventors' expectations that they will someday receive a patent undeservedly," the result is a "reduction in the perceived false-positive rate," which "can in turn increase marginal rewards for inventing and disclosing in the future." Stephen Yelderman, *The Value of Accuracy in the Patent System*, 84 U. Chi. L. Rev. 1217, 1283 (2017). The long-term benefits of encouraging and ensuring post-grant review weigh in favor of making AIA proceedings available to "[a]ny person other than the patent owner" without exception.

By creating reliable review mechanisms to enforce rules against overbroad patent claims, the AIA's post-grant procedures also create incentives for applicants to claim and disclose inventions more precisely, giving the

public more clarity and notice of a granted patent's scope. These mechanisms should remain available to government entities so that the public can benefit in full from the AIA's intended effects.

III. Congress's Decision to Limit the AIA's Expansive Estoppel Bar to District Court and ITC Actions Is Eminently Reasonable; It Is also Irrelevant.

Petitioner and *amici* rely heavily on arguments about the AIA's estoppel provisions. Those arguments rely on flawed assumptions about the availability of estoppel outside the AIA and compelling reasons Congress had for crafting the AIA's estoppel provisions as it did. Moreover, Petitioner's emphasis on estoppel is striking given that its position, if adopted, would require duplicative patent litigation.

But, ultimately, Congress's decision to exclude the Court of Federal Claims from the list of proceedings subject to the AIA's estoppel provisions should not obscure the broad language it used to permit "[a]ny person other than the patent owner" to petition for review.

A. Principles of *Res Judicata* Apply in the Court of Federal Claims.

Petitioner says the government "would receive a free pass to relitigate its challenges to a patent's validity" if it could petition as a "person" under the AIA. Pet'r Br. at 18. Not so. Traditional principles of *res judicata* apply with full force in the Court of Federal Claims, including against the government. *See, e.g.*, *Reoforce, Inc. v. United States*, 119 Fed. Cl. 1 (2013)

(*res judicata* bars re-litigation of validity issues decided in administrative mining contests).

In fact, even if the government is *not* treated as a person, these principles may bar re-litigation of issues once finally decided in Patent Office proceedings. In *Coakwell v. United States*, 292 F.2d 918 (Ct. Cl. 1961), *res judicata* barred the government from re-litigating validity issues the PTO had decided in a previous interference proceeding that had resulted in a final judgment. The government itself was not a party to the interference—a proceeding in which two individuals dispute priority of invention before a Patent Office tribunal.

The losing party in the interference was a flight surgeon, who had been serving in the U.S. Navy when he developed his invention, which if patented, the government would have a right to use. Although not a party to the interference, the government was barred from re-litigating a validity issue already decided in a Patent Office proceeding where the government's "interests were at stake," it had "actively participated," and thus "had 'its day in court.'" *Id.* at 920-21. *Coakwell* makes clear that the government will not have a free pass to re-litigate validity issues that the PTAB decides. Once a "Patent Office action . . . becomes final, it is equally binding on the parties." *Id.* at 920. The government is not exempt from that rule.

B. Congress Had Compelling Reasons to Apply an Expansive Estoppel Bar Only to Subsequent District Court and ITC Actions.

Petitioner's argument relies on the similarly flawed assumption that Congress would have no reason to apply

the AIA's expansive estoppel provisions exclusively to private litigants. Again, not so. The AIA provides for estoppel beyond the extent permissible under principles of *res judicata*, reaching not only issues actually litigated but any the petitioner "raised or reasonably could have raised." Congress had compelling reasons not to apply such expansive estoppel provisions actions against the government in the Federal Court of Claims.

The concerns justifying such expansive estoppel provisions related to potential harassment of patent owners by private litigants. Congress could reasonably have concluded that publicly-funded agencies did not require additional deterrence to avoid wasting resources on duplicative validity proceedings. Nothing in the AIA's legislative history—or the public debate preceding its passage—suggests concerns of this kind existed with respect to government entities.

Limiting estoppel as applied to the government makes sense as a matter of public policy. Diminishing the government's ability to raise validity issues only increases licensing costs that taxpayers will have to bear. Congress's decision to leave the Court of Federal Claims out of the list of proceedings affected by the AIA's estoppel bar wisely avoids that result.

CONCLUSION

EFF respectfully urges the Court to affirm the Federal Circuit's judgment and approve the Patent Office's definition of "person." That definition aligns with longstanding precedent establishing the government's right to challenge granted patents, the Patent Office's pre-existing practice of allowing the government to initiate post-grant proceedings, and the AIA's goal of enhancing third party participation in post-grant proceedings. It is also necessary to prevent invalid patents such as this from impeding innovation the patent system is supposed to promote.

Dated: January 16, 2019

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